BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL L. DAEMEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,004,275
HARPER TRUCKS, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the September 25, 2003 Award of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded a 49 percent permanent partial general disability after the Administrative Law Judge averaged claimant's 78 percent wage loss with a 20.5 percent task loss. Respondent contends claimant did not put forth a good faith effort to find employment and a substantially higher wage should be imputed to claimant. Respondent further contends that claimant suffered no task loss, as was determined by the treating physician, Ronald B. Davis, M.D. Respondent, finally, argues that under *Watkins*,[1] claimant returned to an unaccommodated position and should be limited to his functional impairment. Claimant, on the other hand, argues that the Award of the Administrative Law Judge is appropriate and should be affirmed. The Appeals Board (Board) heard oral argument on March 9, 2004.

APPEARANCES

Claimant appeared by his attorney, E. L. Lee Kinch of Wichita, Kansas. Respondent appeared by its attorney, Gary K. Albin of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

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[1] *Watkins v. Food Barn Stores, Inc.*, 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

ISSUES

What is the nature and extent of claimant's disability? More particularly, did claimant put forth a good faith effort to find employment after his termination from employment with respondent, is claimant entitled to an award based on her actual post-injury earnings or should a wage be imputed, did the Administrative Law Judge appropriately consider the task loss opinions of the three health care professionals who provided same into the record, and does *Watkins* apply to this circumstance?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant worked as general manager of respondent's webbing plant, when, on August 13, 2001, while at a trade show in Chicago, Illinois, he suffered an injury to his right shoulder and neck. Claimant testified that he slung a book bag, which he described as a backpack, onto his right shoulder, at which time he felt a pinch go through him. He reported the injury and was referred to OccMed Associates in Wichita, Kansas, where he was examined and treated by Ronald B. Davis, M.D., board certified in family practice and occupational medicine. Dr. Davis first examined claimant on August 19, 2001, treating claimant over a period several months. He referred claimant for physical therapy and, on August 23, placed temporary restrictions on claimant. As of September 2001, he could find no objective findings during his examination of claimant. He ordered a cervical MRI, which displayed a small disc protrusion on the right side at C6-7 and a very mild right-sided neural foraminal narrowing at C7-T1.

Dr. Davis rated claimant at one-half of 1 percent to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), but placed no permanent restrictions on claimant. Dr. Davis also reviewed a task list, prepared by vocational expert Monty Longacre, opining that claimant was capable of performing all of the jobs on that list. Dr. Davis felt claimant had reached maximum medical improvement, last seeing him on January 9, 2002. He did find claimant demonstrated a loss of cervical range of motion, with some discomfort, but felt there were no objective findings to warrant any type of rating greater than that imposed. Dr. Davis acknowledges claimant advised he was not as physically capable of performing his job based upon his limited range of motion.

Claimant was referred to board certified physical medicine and rehabilitation specialist Philip R. Mills, M.D. Dr. Mills first examined claimant on January 22, 2002, as part of an independent medical evaluation. Claimant alleges that Dr. Mills became the authorized treating physician, although respondent disputes this. Dr. Mills testified he was

unable to recall who referred claimant to him. However, Dr. Mills did treat claimant three separate times from January 2002 through September 2002. He initially diagnosed cervical sprain, rhomboid sprain and underlying degenerative disc disease, recommending outpatient physical therapy, a cervical pillow and a Thermophore heating unit. He placed restrictions on claimant to avoid prolonged, repetitious neck hyperextension, and assessed claimant a 5 percent impairment to the body as a whole based upon the DRE Cervicothoracic Category II, pursuant to the AMA *Guides* (4th ed.). He found claimant to be at maximum medical improvement as of February 25, 2002, but did get the opportunity to examine claimant one additional time on September 18, 2002. At that time, his impressions of claimant were unchanged and he did not modify his restrictions or impairment rating.

Dr. Mills, when presented a task analysis prepared by Mr. Longacre, testified that claimant was incapable of performing two of the thirty-nine tasks on the list, for a 5 percent task loss. It is noted that the two tasks claimant was unable to perform were tasks associated with claimant's employment with respondent. They also involved prolonged neck hyperextension, which violated Dr. Mills' only restriction on claimant.

Effective April 4, 2002, claimant was terminated from respondent's employment due to the financial condition of respondent's webbing plant. Claimant stated that up to that point in time, he had self-restricted his activities, as there were certain physical activities claimant felt he was no longer capable of performing. He specifically discussed activities such as pushing wheels, which claimant testified he would assign to subordinates. Claimant was the manager of the webbing plant and was, therefore, in a position to assign whatever job duties he felt necessary to anyone below him.

Claimant's testimony is somewhat conflicting in that he testified he talked to Carl Travillion, the executive vice president for respondent, about physical limitations and certain aspects of the job he was no longer able to perform. However, Mr. Travillion testified that claimant never mentioned any physical problems performing his work after the August 2001 accident. Claimant did acknowledge that he never provided any specific restrictions to respondent from any health care provider, stating merely that he self-limited and self-accommodated his job.

After leaving respondent's employment, claimant searched for work, testifying that he had completed approximately 118 applications for employment from April 2002 through June of 2003. Claimant was unable to secure employment through any of those contacts. However, claimant was an independent real estate agent and was earning wages of $360.50 per week performing his real estate duties. Claimant testified he continued with his job search, primarily through e-mail and the Internet, but only had two or three actual job interviews. He did testify that he had not turned down any potential jobs and continued his search.

Claimant was referred by his attorney to Jane K. Drazek, M.D., board certified in physical medicine and rehabilitation and medical director of Via Christi Rehabilitation Center in Wichita. Dr. Drazek examined claimant one time on August 13, 2002. She diagnosed claimant with chronic cervical pain and hypomobility, as well as right medial scapular strain. She testified that there was evidence of a mild right side bulge at C6-7 and a narrowing of the neural foramen at C7-T1, which is consistent with the findings by Dr. Davis. Dr. Drazek also assessed claimant a 5 percent impairment to the body as a whole based upon the AMA *Guides* (4th ed.) DRE Category II, which is identical to that provided claimant by Dr. Mills. She provided substantial restrictions, including advising claimant to avoid maintaining his head and neck in any one position for a prolonged period, avoid prolonged sitting and limit the use of his right upper extremity in overhead work. She restricted claimant's maximum lift to 35 to 40 pounds, with a repetitive lift of 15 to 20 pounds.

Dr. Drazek reviewed the task analysis, prepared by vocational expert James Molski, opining claimant was incapable of performing eight of twenty-two tasks, for a 36 percent task loss. However, on cross-examination, she was questioned on several of the tasks, acknowledging that her task opinion should be modified, with the ultimate limitation being that claimant was incapable of performing three of twenty-two tasks, for a 14 percent task loss.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

K.S.A. 44-510e(a) defines functional impairment as:

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Both Dr. Mills and Dr. Drazek found claimant to have suffered a 5 percent impairment to the body as a whole based upon the AMA *Guides* DRE Category II. Dr. Davis provided a substantially lower impairment rating, also based upon the AMA *Guides*. But the Board finds Dr. Davis's impairment to be somewhat questionable considering the symptoms displayed by claimant and the positive findings on the cervical MRI. The Board, therefore, finds that claimant has suffered a 5 percent impairment to the body as a whole on a functional basis.

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[2] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

K.S.A. 44-510e defines permanent partial general disability as:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In considering what, if any, task loss claimant has suffered, the Board must consider the opinions of the health care providers who have testified in this matter. Dr. Davis found claimant to have suffered no task loss. However, again, it is questioned whether Dr. Davis's opinion can be considered credible, as the physical limitations displayed both during claimant's examinations and on the MRI indicate that claimant has, to some extent, been limited in his ability to perform tasks. The independent medical examiner, Dr. Mills, provided a more credible opinion regarding what, if any, task loss claimant may have suffered, opining that claimant had lost the ability to perform two tasks while employed with respondent, both of which involved hyperextension of the neck. Dr. Mills found claimant to have suffered a 5 percent task loss.

Dr. Drazek, claimant's hired expert, initially found claimant to have suffered a 36 percent task loss, based upon the task list of Mr. Molski. However, on cross-examination, Dr. Drazek's opinion changed. She ultimately agreed claimant had lost the ability to perform three out of twenty-two tasks, for a 14 percent task loss. The Board, in reviewing the task opinions, finds that both Dr. Mills' opinion and Dr. Drazek's modified opinion should be taken into consideration and that claimant has suffered a 9.5 percent loss of task performing abilities.

The Board must next determine what, if any, wage loss claimant may have suffered. K.S.A. 44-510e requires that the fact finder look at the difference between the wage the worker was earning at the time of the injury and the wage the worker is earning after the injury. In this instance, claimant is earning $360.50 per week as a real estate agent. It was stipulated that claimant's average weekly wage on the date of accident was $1,665.07, including fringe benefits.

However, K.S.A. 44-510e must be read in light of both *Foulk*[3] and *Copeland.*[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing to attempt to perform an accommodated job which the employer had offered and which paid a comparable wage.

Respondent argues that the job that claimant returned to was unaccommodated and, therefore, the policies set forth in *Watkins*[5] apply. In *Watkins*, the claimant was returned to work in an unaccommodated position, performing his regular duties, until he was laid off for economic reasons. The court in *Watkins* found the claimant's ability to perform work in the open labor market and to earn comparable wages had not changed.

Since *Watkins*, the language of K.S.A. 44-510e has been modified. There have, however, been several cases that consider whether *Watkins* applies to the language contained in the present version of K.S.A. 44-510e. The Kansas Court of Appeals, in *Helmstetter*,[6] found that the *Watkins'* decision was based upon a different definition of work disability under K.S.A. 44-510e, thereby distinguishing *Watkins* as it applied to a substantially different version of the work disability definition. However, other cases since *Helmstetter* have applied the *Watkins'* analysis to the current version of K.S.A. 44-510e.[7]

A primary issue is whether claimant was accommodated in his return to employment. While respondent argues that claimant returned to the same job, claimant testified that he was forced to self-accommodate, as certain job tasks were too much for him. Additionally, Dr. Mills and Dr. Drazek agreed that claimant's restrictions prevent him from performing certain job tasks that he performed in his job with respondent. Fortunately, claimant's position as plant manager allowed him to delegate those tasks, which he was physically incapable of performing, to other workers in the plant. Therefore, claimant is found to have self-accommodated his job with respondent. Thus, this case is factually distinguished from *Watkins* and claimant is entitled to a work disability.

The Board must next look to whether claimant put forth a good faith effort to find employment after his termination with respondent. The Board finds the policies of *Foulk* do not apply, as claimant's layoff was the result of an economic slowdown, rather than claimant's refusal to work. However, the Kansas Court of Appeals, in *Copeland,* held that for the purpose of the wage-loss prong of K.S.A. 44-510e (Furse 1993), a worker's post-injury wage should be based upon ability, rather than actual wage, if the worker fails to make a good faith effort to find appropriate employment. In this instance, claimant

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[5] *Watkins, supra*.

[6] *Helmstetter v. Midwest Grain Products*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

[7] *Newman v. Kansas Enterprises,* 31 Kan. App. 2d 929, 77 P.3d 494 (2002); *Tallman v. Case Corp.*, 31 Kan. App. 2d 1044, 77 P.3d 494 (2003).

testified to making numerous attempts at finding employment, both by filling out applications and by applying to various businesses through e-mail. Claimant continued his job search, even while working as a real estate agent, earning $360.50 per week. The Board finds from the evidence in this record, that claimant has put forth a good faith effort to obtain employment and, therefore, his wage loss will be based upon actual wages. The record shows claimant was earning $360.50 per week as a real estate agent, which is the amount used by the Administrative Law Judge in determining that claimant had suffered a 78 percent wage loss. The Board affirms that finding. In comparing both the wage and task losses suffered by claimant, the Board finds claimant has suffered a permanent partial general disability of 43.75 percent based upon a 78 percent wage loss and a 9.5 percent task loss. The Award of the Administrative Law Judge is, therefore, affirmed with regard to claimant's 5 percent functional impairment and with regard to the wage loss suffered, but modified with regard to the task loss suffered as above noted.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 25, 2003, should be, and is hereby, modified, and claimant is granted a 5 percent permanent partial general disability to the body as a whole on a functional basis, followed by a permanent partial general disability of 43.75 percent.

Claimant is entitled to 20.75 weeks permanent partial general disability at the rate of $417 per week totaling $8,652.75 for a 5 percent impairment to the body as a whole on a functional basis, followed thereafter by 160.81 weeks permanent partial general disability at the rate of $417 per week totaling $67,057.77 for a 43.75 percent permanent partial general disability, for a total award of $75,710.52.

As of March 15, 2004, claimant is entitled to 20.75 weeks permanent partial disability on a functional basis at the rate of $417 per week totaling $8,652.75, followed by 114.29 weeks permanent partial general disability at the rate of $417 per week totaling $47,658.93, for a total due and owing of $56,311.68, minus any amounts previously paid. Thereafter, claimant is entitled to 46.52 weeks permanent partial general disability at the rate of $417 per week totaling $19,398.84, until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: E. L. Lee Kinch, Attorney for Claimant
Gary K. Albin, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director